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No. 77

July 6, 1998

S. 648 — Product Liability Reform Act

Calendar No. 90

Reported from the Committee on Commerce, Science and Transportation on June 19, 1997, without amendments. S. Rept. 105-32. Minority view filed.

NOTEWORTHY

- On Friday, June 26, 1998, the Majority Leader filed a cloture petition on the motion to proceed to S. 648. A cloture vote is scheduled to occur at 9:30 a.m. on Tuesday, July 7, 1998.
- Senators Gorton, Rockefeller and Lieberman plan to offer a substitute (S. 2236) that is a scaled-back (narrower) version of the bill that passed during the last Congress, and was vetoed by President Clinton in 1996. The substitute language is said to meet the President's objections and sponsors say the President will sign it into law if presented in its current form. This Legislative Notice is based on the substitute (S. 2236, introduced and read the first time on June 25, and read the second time and placed on the calendar on June 26, 1998).
- The substitute would establish a national standard for awarding punitive damages that is more strict than many existing state laws. It includes a \$250,000 cap on punitive damages against individuals and small businesses, and it places an 18-year limit on the filing of lawsuits relating to harm caused by goods used in the workplace.
- The major differences between the substitute and S. 648 are that the substitute does not contain joint and several liability, does not cap punitive damages for larger businesses with revenues above \$5 million and more than 25 employees, and the statute of repose applies only to durable goods used in the workplace.
- Title II of the substitute contains the provisions of the Lieberman-McCain Biomaterials Access Assurance Act (same as in S. 648) to protect suppliers from costly litigation that is putting at risk supplies of raw materials and component parts that are vital to device manufacturers (but silicone breast implant cases are expressly excluded).

HIGHLIGHTS

Republican chief bill sponsor Gorton describes the bill as "an incremental step toward reforming the current judicial lottery system, where runaway awards inflate the price of goods, stifle innovation . . . and hurt America's ability to compete." In their "Dear Colleague" letter of June 29, 1998, Senators Gorton and Rockefeller say this compromise bill "creates a national framework for a more rational process in litigation regarding products liability." In summary, the compromise includes:

- Strong protection for product sellers, renters, lessors, and suppliers;
- Strong protections for biomaterials suppliers;
- Uniform federal statute of limitations and statute of repose for workplace durable goods;
- Defense available if plaintiff's intoxication causes harm;
- Reduction of damages for misuse or alteration;
- Uniform federal evidentiary standard for awarding punitive damages;
- Limitations on punitive damages against small business; and
- Incentives to resolve litigation.

I. Whoever Creates Harm Should Take Responsibility For It.

Product Sellers. Product sellers, as well as persons who rent or lease, would be liable only for injuries caused by their own negligence or failure to comply with an express warranty. However, if the manufacturer cannot be brought into court or is unable to pay a judgment, the seller shall be liable as if it were a manufacturer. This assures that injured persons will always have available an avenue for recovery.

Alcohol and Drugs. The defendant has an absolute defense if the plaintiff was under the influence of drugs or alcohol when the accident or event occurred and the condition was more than 50 percent responsible for the plaintiff's injuries.

Rental Car and Equipment Lessors. The bill also addresses the vicarious liability of rental car and equipment leasing companies. In some states, those companies, simply by owning the car or equipment, are liable for the tortious acts of those who rent or lease such items. The bill removes this vicarious liability. It provides that parties who rent or lease products will be subject to liability for their own negligence, but not the negligence of others beyond their control.

II. The Bill Reduces Legal Costs.

Alternative Dispute Resolution (ADR). Either party may offer to participate in a voluntary, nonbinding state-approved ADR procedure. If a defendant unreasonably refuses to participate, and a judgment is entered for the claimant, the defendant must pay the claimant's reasonable legal fees and costs incurred during the trial. No penalty may be assessed against a defendant unless judgment is entered for the claimant and the defendant is found to have acted unreasonably or not in good faith in refusing to participate in ADR.

There is no penalty for claimants who refuse to participate in an ADR procedure. Consequently, claimants are in control of whether they choose to use ADR procedures as a quicker and cheaper mechanism of handling their claim. This provision particularly aids claimants with relatively minor injuries (under \$100,000) as those individuals often have difficulty finding a lawyer to take their case on a contingency basis due to the expense of preparing for trial. Also, it should help such individuals receive compensation for their claims more quickly and bypass the need to retain costly legal representation.

Punitive Damages Reforms.

- **Uniform Standard.** The Act creates a uniform legal and evidentiary standard for punitive damages. States not permitting punitive damages would be unaffected — punitive damages would still be unavailable in those states. Punitive damages may be awarded if a plaintiff proves, by clear and convincing evidence, that the harm was caused by the defendant's "conscious, flagrant indifference to the safety of others."
- **Bifurcation.** To avoid prejudice and confusion, trials may be bifurcated so the punitive damages phase is separate from the proceedings on compensatory damages. Either party can request the trial be conducted in two phases, one dealing with compensatory damages and the other dealing with punitive damages. The same jury is used in both phases. In the phase on punitive damages, evidence on the defendant's profits from the alleged wrongdoing is admissible, but evidence about the defendant's overall assets is not admissible.
- **Small Business Limit.** Punitive damages awards against small businesses may not exceed two times the amount of compensatory damages or \$250,000, whichever is less. Small business is defined to cover entities with fewer than 25 full-time employees and less than \$5 million in annual revenue.

Workers' Compensation Subrogation. Damages may be reduced by the amount of the claimant's workers' compensation benefits if the employer's conduct was a substantial factor in causing the claimant's harm.

Biomaterials Access Assurance. Title II is identical to the Biomaterials Access Assurance Act, introduced by Senators Lieberman and McCain, which was also contained in the 1995 legislation. The bill would help safeguard the availability of implantable medical devices, such as pacemakers, heart valves, artificial blood vessels, angioplasty catheters, and hip and knee joints, among others. Suppliers do not want to risk having to pay enormous legal fees to defend against meritless product liability suits when those legal fees far exceed any profit they make from supplying the raw materials.

III. The Bill Protects the Right of Injured Persons to Receive Compensation.

Statute of Limitations. The pro-plaintiff statute of limitations is two years, which begins to run when the claimant discovered, or reasonably should have discovered, both the harm and its cause. The time would not begin to run for people with a legal disability until two years after such disability ceased.

Statute of Repose. For workplace durable goods, there would be an 18-year limit beyond which the manufacturer could not be sued. This would create a statute of repose in the 37 states currently without one and would preempt shorter statutes of repose in the other 13 states. State statutes of repose covering other goods, such as consumer products, are not affected. If there is an express warranty in writing as to the safety of the product involved that is longer than 18 years, a product liability action is timely for the duration of the warranty.

BACKGROUND

Traditionally, product liability has been a matter left to State law, but over the last decade, it has become evident that the morass of product liability law is a problem of national concern that requires congressional action. The system of compensating people injured by defective products is costly, slow, inequitable, and unpredictable.

Many consumers who are injured by defective products and deserve compensation are unable to recover damages or must wait years for recovery. The product liability litigation system can produce startlingly different results in identical cases. Moreover, it does not compensate injured persons in proportion to their losses. Injured victims with the severest injuries tend to receive far less than their actual economic losses, while those with minor injuries may receive many times their losses.

The costs of the product liability system have increased substantially. Over the last 40 years, general liability insurance costs have increased by over four times the rate of growth of the national economy. The transaction costs associated with the product liability systems (costs of litigation, court proceedings, and attorneys' fees) are enormous. A 1992 study by the Insurance Services Office (ISO) of closed claims found that for every \$10 paid to claimants by insurance companies in product liability cases, another \$7 is paid for lawyers and other transaction costs. According to the Rand Institute in 1985, net compensation to tort plaintiffs was \$13 billion to \$15 billion, while the attorneys' fees and other transaction costs totaled \$15 billion to \$19 billion — that is, of the total pot of money, less than half went to the injured parties.

The inefficiency and unpredictability of the product liability system have made it difficult for manufacturers of products, such as machine tools, medical devices, or vaccines, to buy adequate insurance coverage. This unpredictable patchwork of State laws has had a chilling effect on the introduction of new products to market. Moreover, the current U.S. product liability system has hurt our competitive position in world markets because the excessive costs of the system result in higher prices for American products and fewer job opportunities. American manufacturers and product sellers generally pay product liability insurance rates that are 20 to 50 times higher than those for foreign competitors. Adverse impacts based on actual liability experience include closed production plants, laid-off workers, discontinued product lines, decisions against introducing new products, decisions against acquiring/merging, discontinued product research, and lost market share.

Thus, the present system has an adverse impact on plaintiffs and defendants, manufacturers, product sellers, and consumers. The individual States cannot fully address the problems of the product liability system. Proponents claim reform at the federal level is urgently needed.

Proponents of product liability reform argue that the excessive costs of the system benefit no one but lawyers. American businesses are competitively disadvantaged, good products are kept off the market due to liability concerns, consumers pay higher prices, and transaction costs exceed the amount of money that ultimately goes to individuals legitimately injured by faulty products.

Opponents of reform argue that the product liability system encourages the development of safe products due to the threat of punitive damages. Reform opponents also claim domestic products enjoy a competitive advantage over foreign products because they are, as a result of the product liability system, safer than foreign products.

However, the safety benefits of product liability reform are evidenced in the General Aviation Revitalization Act, signed into law by President Clinton on August 17, 1994, which established a uniform, national statute of repose of 18 years for noncommercial general aviation aircraft. While opponents of product liability reform opposed that Act on the grounds that it would lead to the production of less safe aircraft, the opposite has occurred. The safety of general aviation aircraft has improved as new, more advanced and safer component systems have been introduced. The Act also fostered the domestic production of new, more modern, general aviation aircraft.

Recent Legislative History

Proponents of product liability reform have been working to enact legislation since 1981 when Republican Senator Bob Kasten led the effort. Senators Rockefeller and Gorton first introduced The Product Liability Fairness Act (S. 687) in the 103d Congress and on June 28, 1994, a motion to invoke cloture failed 54 to 44; the next day, a second motion to invoke cloture failed 57 to 41. During the 104th Congress, Senators Gorton and Rockefeller once again introduced product liability legislation (S. 565). The bill was passed by the Senate on May 10, 1995, by a vote of 61 to 37. Previously, the House had passed its version (H.R. 956) on March 10, 1995, by a vote of 265 to 161. The conference report, which was similar to the bill passed by the Senate, was approved by the Senate on March 21, 1996, by a vote of 50 to 40 and by the House on March 29 by a vote of 259 to 158. The President vetoed the bill on May 2, 1996.

BILL PROVISIONS

Section-by-Section Summary (Provided by the Offices of Senators Gorton and Rockefeller)

1. Short Title; Table of Contents.
2. Findings; Purposes.

TITLE I — PRODUCT LIABILITY REFORM

101. Definitions.

102. Applicability; Preemption.

The Act covers product liability actions brought in federal or state court on any theory for harm caused by a product, but excludes actions for: (i) commercial loss; (ii) negligent entrustment; (iii) negligence per se concerning firearms and ammunition; (iv) dram-shop; (v) harm caused by a tobacco product; or (vi) harm caused by a silicone breast implant.

State law is superseded only to the extent it applies to a matter covered by the Act. Matters not governed by the Act, including the standard of liability applicable to a manufacturer, continue to be governed by applicable federal or state law.

103. Liability Rules Applicable to Product Sellers, Renters, and Lessors.

Product sellers, renters, and lessors will be liable only for their own failures and misdeeds:

- a product seller, renter, or lessor is liable if the harm that is the subject of the action was caused by (i) his failure to exercise reasonable care, (ii) his intentional wrongdoing, or (iii) the product's failure to conform to his express warranty;
- failure to inspect the product will not constitute failure to exercise reasonable care if there was no opportunity to inspect the product or an inspection wouldn't have revealed the problem;
- product sellers are liable as manufacturers if the manufacturer is judgment-proof or not subject to service of process, in which case the statute of limitations is tolled until judgment is entered against the manufacturer; and
- renters and lessors are not liable solely by reason of ownership.

104. Defense Based on Claimant's Use of Alcohol.

It is a complete defense in a product liability action if the claimant was under the influence of drugs or alcohol and, as a result, was more than 50 percent responsible for the harm.

105. Misuse or Alteration.

Damages for which a defendant is otherwise liable under state or federal law are reduced in proportion to the percentage of harm caused by misuse or alteration of a product if such misuse or alteration was in violation of a manufacturer's warning or involved a risk that was or should have been known by an ordinary person who uses the product. Such damages are not reduced by the percentage of harm attributable to an employer who is immune from suit.

106. Statute of Limitations.

The Act creates a uniform, two year statute of limitations — product liability claims in all states must be filed within two years of the date the harm and the cause of the harm was, or reasonably should have been, discovered.

107. Statute of Repose for Durable Goods Used in a Trade or Business.

The Act creates a uniform 18-year statute of repose for harm (other than toxic harm) caused by durable workplace goods where the claimant has workers compensation coverage, with exceptions for general aviation, transportation of passengers for hire, and products with an express warranty of safety or life expectancy beyond 18 years.

108. Transitional Provision.

Claimants have a full year after enactment to bring a claim, regardless of the impact of the new federal statute of limitations or statute of repose.

109. Alternative Dispute Resolution.

Claimants and defendants are encouraged to use voluntary, non-binding ADR as available under state law.

110. Punitive Damages Reforms.

Uniform Standard. The Act creates a uniform legal and evidentiary standard for punitive damages — the claimant must establish by clear and convincing evidence that the harm was the result of conduct carried out with a conscious, flagrant indifference to the rights or safety of others. Punitive damages explicitly are not created in states that do not otherwise allow them.

Bifurcation. Any party can request that punitive damages be determined in a separate proceeding and that evidence relevant only to the punitive damages determination not be introduced in the underlying action.

Small Business Limit. Punitive damages awards against small businesses may not exceed two times the amount of compensatory damages or \$250,000, whichever is less. Small business is defined to cover entities with 25 or fewer employees and less than \$5 million in annual revenue. Limitation also applies to local governments and individuals with net worth under \$500,000.

111. Liability for Certain Claims Relating to Death.

Provisions regarding punitive damages will not apply for one year in states that, in wrongful death actions, permit recovery only for punitive damages.

112. Workers Compensation Subrogation.

An employer or insurer may lose its lien against a judgment or settlement in a products liability case involving a workplace accident if the employer's conduct was a substantial factor in causing the claimant's harm — thereby providing an incentive for safer workplaces and ensuring workers receive full recovery for their injuries.

TITLE II — BIOMATERIALS ACCESS ASSURANCE

A supplier of biomaterials (component or raw materials used in the manufacture of implantable devices) is permitted to seek early dismissal from claims unless he (i) manufactured the device; (ii) sold the device; or (iii) furnished materials that failed to meet contract requirements or specifications. In the event that the manufacturer or other responsible party is bankrupt or judgment-proof, a supplier will be brought back into the suit if there is evidence of his liability. Lawsuits involving silicone gel breast implants are expressly excluded.

TITLE III — LIMITATIONS ON APPLICABILITY; EFFECTIVE DATE

301. Federal Cause of Action Precluded.

No federal causes of action are created.

302. Effective Date.

The Act applies to all actions commenced on or after the date of enactment.

OTHER VIEWS

Groups that have endorsed the Gorton-Rockefeller substitute include: National Federation of Independent Business, National Association of Manufacturers, National Association of Wholesalers-Distributors, and the U.S. Chamber of Commerce.

Opponents include trial attorneys and consumer groups. The chemical industry is concerned that the "reduction of damages for misuse or alteration" language in section 105 could be misconstrued. The construction industry is leading the opposition to section 112 on workers' compensation subrogation because they say it would increase workers' compensation litigation and increase costs for employers. Concerned groups include the Associated General Contractors of America, Associated Builders and Contractors, Inc., Alliance of American Insurers, American Insurance Association, and the National Association of Home Builders.

ADMINISTRATION POSITION

There has been no formal communication from the White House on this bill, but in their "Dear Colleague" letter, Senators Gorton and Rockefeller state that "the White House has committed to signing [their bill] into law if it is presented in its current form." In a briefing with reporters last month, White House spokesman Mike McCurry described the Gorton-Rockefeller bill as "we believe deserves bipartisan support this year."

COST

The Congressional Budget Office estimates that "enacting the bill would have no significant effect on the federal budget. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply." [This is from the Committee Report on S. 648.]

POSSIBLE AMENDMENTS

There were no known amendments at press time.

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